

**Tracer Protection Services, Inc. and Shane Crump  
Ormet Primary Aluminum Corporation and Shane  
Crump.** Cases 15-CA-12970 and 15-CA-12971

June 16, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND LIEBMAN

On June 14, 1996, Administrative Law Judge Howard I. Grossman issued the attached decision. Respondent Tracer Protection Services, Inc., filed exceptions, and Respondent Ormet Primary Aluminum Corporation filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions. We shall include a new Order and notice, however, because we find merit in Respondent Ormet's exceptions to the judge's recommendation to impose on it the joint and several obligation to offer reinstatement to discriminatee Crump. Shane Crump was solely the employee of Respondent Tracer. Consistent with Board precedent, the Respondents have joint and several backpay liability to Crump, but only Tracer has the remedial obligation to reinstate him. See *Dews Construction*, 231 NLRB 182 (1977), enfd. mem. 578 F.2d 1374 (3d Cir. 1978). We will order Ormet to notify Tracer that it has no objection to Tracer's rehiring of Crump and assigning him to the Ormet facility, in the event that Tracer performs security services at that facility.

Respondent Tracer has excepted to the judge's finding of liability against it, contending that there is no evidence that it ever knew of any unlawful motive on the part of Ormet for directing that Crump be removed from his guard position with Ormet or knew of Crump's protected activities and was motivated by them in the actions it took against him. We acknowledge that an unlawful motive on the part of Ormet cannot simply be attributed to Tracer without any evidence from which Tracer's own knowledge and motive can be inferred.<sup>2</sup> We find liability

<sup>1</sup> The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that there was contradictory record evidence as to the identity of Richard Sager's employer. In fact, the parties resolved this contradiction at the hearing by stipulating that Sager was solely the employee of Ormet. This does not affect the judge's ultimate findings.

<sup>2</sup> A finding of a violation of an unlawful discharge may be made without a specific showing of motive if the discharge was for misconduct that the employer mistakenly believed an employee had committed

against Tracer because we agree with the judge that the General Counsel has proved that Respondent Tracer knew about Respondent Ormet's unlawful motivation for seeking Crump's removal as a guard at Ormet's facility and that Tracer unlawfully removed and discharged Crump at Ormet's request because he had divulged to union officials an Ormet company plan to discipline them. It is well established that inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial as well as direct evidence. E.g., *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). In particular, the following circumstantial factors support the finding of an 8(a)(1) violation by Tracer.

First, Tracer does not dispute that Ormet would ordinarily tell Tracer officials Ormet's reasons for seeking to remove a Tracer guard. Indeed, that is exactly what both Ormet and Tracer say took place in Crump's situation, both prior to and at an October 4, 1994, meeting of officials from both companies that resulted in the decision to discharge Crump. The judge has found, however, that the alleged legitimate complaint about Crump assertedly communicated by Ormet to Tracer was a pretext. We find it reasonable to infer that, in accord with the Respondents' practice, the real, discriminatory reason was communicated to Tracer along with the pretextual reason.

Second, the judge correctly found that neither Ormet nor Tracer gave a credible reason for discharging Crump. Ormet claimed that Crump violated a written directive for Tracer guards (who operated the Ormet plant switchboard) to limit Ormet employee telephone traffic. Tracer reiterated that claim. The judge, however, specifically found that Tracer supervisor Stephens and Ormet supervisor Sager knew that Tracer guards other than Crump had not followed this directive in placing calls for Ormet employees and had not been sanctioned for their transgressions. Furthermore, Tracer did not merely remove Crump from the Ormet job, as Ormet had requested. It *discharged* him. The judge found that, in justifying this more severe personnel action, Tracer Operations Manager Donald Coleman added several post hoc pretextual reasons to the telephone policy violation explanation given to Crump at the time of his discharge. The assertion of shifting reasons for a challenged discharge warrant the inference that the real reason was an unlawful one. E.g., *Scientific Ecology Group*, 317 NLRB 1259 (1995).

Third, Tracer's discharge of Crump entailed disparate treatment. As previously stated, neither Tracer nor Ormet acted against other guards known to have violated the telephone policy. Furthermore, even assuming Crump's alleged offense may have justified some form

in the course of protected activity (*NLRB v. Burnup & Sims*, 379 U.S. 21 (1964)), or if the circumstances of the discharge met the "inherently destructive" test of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). We agree that those standards do not apply here.

of discipline, discharge clearly was not justified. There is no evidence that Tracer's disciplinary policy mandated discharge for this offense. In contrast, as noted by the judge, Tracer's rules did specifically provide for termination of an employee for sleeping on duty. Coleman, however, decided only to issue a written warning to employee Jonathan Wilkinson for this offense. In sum, Tracer did not take any action against other guards known to have violated the telephone policy directive and did not discharge a guard for a dischargeable offense, yet it quickly and willingly acceded to Ormet's complaint about Crump by removing him from the plant and discharging him. We find that this disparate treatment further warrants the inference that Tracer knew about and acted in accord with Ormet's unlawful motivation to retaliate against Crump for engaging in protected, concerted activity.

Based on the foregoing, we affirm the judge's finding that the General Counsel met the initial burden of presenting evidence sufficient to warrant the inference that protected conduct was a motivating factor in Respondent Tracer's decision to remove Crump from the Ormet plant and to discharge him. We further find that the Respondent Tracer has failed to prove that it would have taken the same action against Crump even in the absence of his protected concerted activity. We therefore affirm the judge's conclusion that Respondent Tracer violated Section 8(a)(1) of the Act.

#### ORDER

A. The National Labor Relations Board orders that the Respondent, Ormet Primary Aluminum Corporation, Burnside, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requesting the removal from its facility of the employees of another employer because they engaged in protected, concerted activity, or causing their employer to discriminate against them in any other manner affecting their wages, tenure, or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Jointly and severally with Tracer Protection Services, Inc., make Shane Crump whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(b) Within 14 days from the date of this Order, remove from its files any references to the unlawful request to remove Shane Crump from his job, and within 3 days thereafter notify the employee in writing that this

has been done and that his removal or discharge will not be used against him in any way.

(c) Within 14 days from the date of this Order, notify Tracer in writing, with a copy to Crump, that it has no objection to Tracer hiring Crump and assigning him to work at Ormet's facility, if Tracer performs security services there.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at Ormet's Burnside, Louisiana, manufacturing plant copies of the attached notice marked "Appendix A."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by an authorized representative of the Respondent, shall be posted and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees employed by Ormet and Tracer since October 4, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

B. The Respondent, Tracer Protection Services, Inc., Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for engaging in protected, concerted activity, or discriminating against them in any other manner affecting their wages, tenure, or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Within 14 days from the date of this Order, offer Shane Crump full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Jointly and severally with Ormet Primary Aluminum Corporation, make Shane Crump whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of Shane Crump, and within 3 days thereafter notify Crump in writing that this has been done and that his discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at Tracer's Baton Rouge, Louisiana, office copies of the attached notice marked "Appendix B."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the authorized representative of the Respondent, shall be posted and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its office, the Respondent shall duplicate and mail at its own expense, a copy of the notice to all current employees employed since October 5, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps each Respondent has taken to comply.

#### APPENDIX A

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT request that Tracer Protection Services, Inc. remove from our facility its employee, Shane Crump, or any other employee for engaging in protected, concerted activities, or otherwise cause their employer to discriminate against any employee for engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, jointly and severally with Tracer Protection Services, make Shane Crump whole for any loss of earnings and other benefits resulting from the removal from his job and his discharge, less any net earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful request to remove Shane Crump from his job, and WE WILL, within 3 days thereafter, notify him in writing that this has been done, and that the request for his removal will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, notify Tracer in writing, with a copy to Crump, that we have no objection to Tracer hiring Crump and assigning him to work at our facility, if Tracer performs security services there.

#### ORMET PRIMARY ALUMINUM CORPORATION

#### APPENDIX B

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government  
The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge Shane Crump or any other employee for engaging in protected, concerted activities, or otherwise discriminate against any employee for engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

<sup>4</sup> See fn. 3.

WE WILL, within 14 days from the date of the Board's Order, offer Shane Crump full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges previously enjoyed.

WE WILL, jointly and severally with Ormet Primary Aluminum Corporation, make Shane Crump whole for any loss of earnings and other benefits resulting from his discharge, less any net earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Shane Crump, and WE WILL, within 3 days thereafter, notify him in writing that this has been done, and that his discharge will not be used against him in any way.

#### TRACER PROTECTION SERVICES, INC.

*Stacy M. Stein, Esq.*, for the General Counsel.

*David G. Burton, President*, for Respondent, Tracer Protection Services, Inc.

*William R. D'Armond, Esq. (Kean, (Miller, Hawthorne, D'Armond, McCowan & Jarman)*, of Baton Rouge, Louisiana, for Respondent, Ormet Primary Aluminum Corporation.

### DECISION

#### STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charges in Cases 15-CA-12970 and 15-CA-12971 were both filed on November 21, 1994.<sup>1</sup> Shane Crump, an individual (Crump). Complaint issued on March 27, 1995. It alleges that Crump was an employee of Tracer Protection Services, Inc. (Tracer) and that, on September 15, he engaged in concerted protected activities together with employees of Ormet Primary Aluminum Corporation (Ormet). The complaint further alleges that, on October 5, Ormet caused Tracer to discharge Crump because of his aforesaid protected activities, and that Tracer did so, in violation of Section 8(a)(1) of the National Labor Relations Act. These matters were heard before me on January 22 and 23, 1996, in Baton Rouge, Louisiana. Thereafter, the General Counsel and Ormet filed briefs. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following:

#### FINDINGS OF FACT

##### I. BACKGROUND AND JURISDICTION

Ormet has two facilities at Burnside, Louisiana. The first is a plant that manufactures alumina, an intermediate for aluminum, from bauxite ore. The second, adjacent to the manufacturing plant, is a marine terminal which Ormet leases from the Port of Greater Baton Rouge. The employees at both facilities have been represented for many years by labor organizations, the manufacturing plant employees by the United Steelworkers of America, Local Union 14465, AFL-CIO (Union). The marine terminal hourly employees are represented, according to their job classifications, by the International Longshoremen's Asso-

ciation, the International Union of Operating Engineers, and the United Plant Guard Workers.

Tracer was in the business of supplying contract security services with an office in Baton Rouge, Louisiana. During the time period relevant herein, Ormet had a contract with Tracer to supply guard services at the manufacturing plant. Ormet also had its own guards at the marine terminal.

The pleadings establish that, during the 12-month period preceeding February 28, 1995, Ormet sold and shipped from its facility goods valued in excess of \$50,000 directly to points located outside the State of Louisiana.

The parties also agreed that, during the same time period, Tracer supplied services valued in excess of \$50,000 both to Ormet and to our Lady of the Lake Hospital, a hospital located in the State of Louisiana, which derived gross revenues in excess of \$250,000.

Ormet and Tracer are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. Summary of the Evidence

##### 1. Crump's hiring and duties

Donald Coleman was Tracer's operations manager.<sup>2</sup> He testified that he supervised the guards which Tracer assigned to the Ormet facility. Tracer's rules provided that a guard had to follow the "chain of command"—if a guard had any concerns, he was to report it to his "immediate supervisor."<sup>3</sup>

Crump was hired on July 18, and assigned to the Ormet facility. He testified to a wide variety of duties which guards were required to perform. He worked principally inside a guard shack located near the main gate just inside the fence. His duties included operating a switchboard for all incoming and outgoing calls, logging in all deliveries, contractors and their employees, and logging in visitors and checking their passes. Guards had to secure taxis for overtime workers, obtain meal orders from employees, and deliver them. They had to write down the number of every vehicle that left, and the driver's name. Guards handled payroll checks, determined the weather, and supervised ice cream sales. Guards worked a 12-hour shift, and had no official lunchbreaks. Another employee came in occasionally to answer the phones, so that Crump could "get a little peace to eat some lunch."

##### 2. The alleged protected activities

Crump testified that he overheard a conversation on September 15th among Ormet supervisors—General Manager Quentin Bell, Supervisors Guy Arnone and Bobby Boyle, and another supervisor.<sup>4</sup>

Crump testified that he overheard the supervisors discuss disciplining several union officials, including Union president Joey Letulle, by suspending and then firing them. Arnone said that there were three employees he wanted to get rid of. The

<sup>2</sup> The pleadings establish that Coleman was a Tracer supervisor within the meaning of the Act.

<sup>3</sup> G.C. Exh. 4.

<sup>4</sup> The pleadings establish that Quentin Bell was Ormet's general manager, Guy Arnone its maintenance manager, Bobby Boyle a general supervisor, and that all were Ormet supervisors within the meaning of the Act.

<sup>1</sup> All dates are in 1994 unless otherwise specified.

conversation took place outside the guard shack, at about 11:40 a.m. The supervisors saw Crump and lowered their voices. Crump was outside the guard shack smoking a cigarette.

General Manager Bell testified that he had many conversations in this area during September. In one of them, which he had alone with Supervisor Arnone, they discussed progressive discipline. Bell stated that he saw Crump, about 45 feet away. He remembered this distance because he "marked it off" the morning of the hearing in this matter. The time of this conversation was about 1:40 p.m. Bell claimed that no employees were discussed by name.<sup>5</sup>

Crump averred that, immediately after overhearing this conversation, he called Union President Joey Letulle, and informed him of what he had heard. Letulle corroborated Crump's testimony. He asked Crump to reduce his information to writing and Crump did so.

Letulle was the Union's president in September 1994. He testified that he applied to be a supervisor and ceased being the Union's president in November 1995. He was a supervisor at the time of the hearing.

In September 1994, Letulle and employee Gary Stonecipher were being investigated for possible insubordination. They had attended one session on about September 15 or 16 with Supervisors Johnny Schexnayder and Danny Rodrigue.<sup>6</sup> At that session, Schexnayder told them that he would investigate the alleged insubordination, and be back with them. They were then called to a second session with Schexnayder on about September 16 or 17. Rodrigue did not attend this session. Crump's call to Union President Letulle came just before the second session with Schexnayder.

Stonecipher testified on direct examination that he and Letulle sat down, and Schexnayder handed them a piece of paper. "What is this?" Letulle asked. "We heard we was getting fired. . . The guard told us that you all was going to fire us." Schexnayder replied that if somebody else had their way, the employees would be fired, but that Schexnayder was going to let them off with a reprimand. The cross-examination of Stonecipher reads in part:

Q: Now, is it your testimony that in the second meeting that you had with Mr. Schexnayder . . . that Joey Letulle said to Mr. Schexnayder that a guard had told him that the company was going to fire him?

A: No, going to fire us.

Q: Fire the three of you. I guess. Two of you?

A: Two of us, yes, for sure.

Q: Your testimony is that Mr. Letulle said that at the second meeting.

A: Plus he told me before the meeting.

<sup>5</sup> On April 25, 1995, the General Counsel issued a complaint against Ormet in another proceeding based on charges filed by the International Longshoremen's Association, No. 3033, AFL-CIO. The case was scheduled for hearing on January 22, 1996. (G.C. Exh 27.) Bell testified in the instant proceeding on January 23, 1996. He asserted that he was unaware of any charge filed against Ormet by the Longshoremen or the Engineers, or that a complaint had issued, or that a hearing was scheduled. Another Ormet official handled such matters. On cross-examination, Bell admitted knowledge that both Unions had filed charges, but said he was unaware of any hearing in the matter. Local Union No. 405, AFL-CIO, and the International Union of Operating Engineers Local Union

<sup>6</sup> The characterization of Schexnayder and Rodrigue as supervisors is based on their testimony which establishes their status.

Q: He told you before the meeting?

A: Right.

Q: Are you testifying that he said that in the meeting with Mr. Schexnayder?

A: Yes, sir.

Q: Is it possible that you could be wrong about that?

A: No.

Q: And that you were getting that confused with another meeting?

A: No. No way. That sticks in my mind too much.

Letulle testified that he stated in a pretrial affidavit that he told Crump he was going to a meeting with Schexnayder, and that he would "find out what this was all about." Letulle further affirmed that, in his pretrial affidavit, he never mentioned at this meeting that "Shane Crump" called and told him that Crump heard that the supervisors wanted to fire Letulle. The latter reaffirmed at the hearing that he never told Schexnayder that "Shane Crump" had given him such information. Letulle agreed that he reported the Crump conversation to 11 members of the Union's executive board.

Supervisor Schexnayder also testified about the second session. He handed Letulle and Stonecipher letters of reprimand.<sup>7</sup> Schexnayder denied that "Stonecipher or anybody" said anything about "Shane Crump." He also denied that Stonecipher or anybody said anything about "a guard" overhearing a management conversation about possible disciplinary action.

Crump testified that other employees asked him the same day what he had overheard. Gossip spreads rapidly in the plant, according to Crump. Stonecipher testified that other employees heard Letulle repeat to Stonecipher the details of Crump's call. It was "common knowledge" in the plant. Stonecipher himself repeated it to other employees.

Simon Gonzales at this time was the Union's subdistrict director in charge of all union affairs in Louisiana. He testified that he had a conversation about these matters with Bob Lamb, Ormet's director of labor relations.<sup>8</sup> He affirmed that the conversation took place in late September.<sup>9</sup> Gonzales testified that he told Lamb that the Union intended to file charges over the fact that supervisors were overheard planning to terminate union officials. Gonzales informed Lamb that one of the management officials was Guy Arnone, and he may have mentioned others.

### 3. Ormet's new telephone policy

Richard Sager, testified that he was Ormet's "Safety Supervisor" at the time of these events, and supervised the guards. Sager's exact status is discussed hereinafter.

One of the duties of the guards was to operate a switchboard transmitting calls into and out of the plant to and from 75 to 100 telephone located inside the plant. In July or August 1994, Ormet installed electronic equipment which enabled it to get a printout of all calls into the plant, the telephone to which they were directed, and the length of the calls. Ormet could also get a record of calls going out of the plant. In addition to the record

<sup>7</sup> Ormet Exhs. 5, 6.

<sup>8</sup> The pleadings establish that Bob Lamb was Ormet's superintendent of labor relations, and a supervisor and agent of Ormet.

<sup>9</sup> Gonzales testified that his pretrial affidavit states that the conversation took place on September 28. His independent recollection was that it took place in late September. He was cross-examined extensively on the date of this conversation, and reaffirmed it several times.

of telephone calls, a schedule of guards was maintained at the guard shack.

Sager said that he reviewed these printouts, and determined that some employees were engaged in long telephone calls to telephones outside the plant. He pointed this out to Ormet's general manager, Quentin Bell. Sager issued a memo on September 2 to the guards pertaining to telephone calls. On incoming calls not of an emergency nature, the guard was to contact the employee's supervisor, who would decide whether the call was to be put through to the employee. On emergency calls, the caller's number was to be obtained, and the employee contacted. If he could not be located, the guard was supposed to reach the supervisor. No outgoing calls of any nature were to be put through without supervisory authority.<sup>10</sup> Sager testified that Bell sent a similar memo to other employees.

Ormet and Tracer claimed that Crump was discharged because he violated this directive. The General Counsel subpoenaed from Ormet records of the telephone calls and the guard schedules.<sup>11</sup> Byron Boyd was Ormet's custodian of records.<sup>12</sup> He supplied the schedules of Ormet's own guards for 1995 and 1996. Boyd testified that he questioned Richard Sager, who was not then employed by Ormet, about the schedules of the guards supplied by Tracer. Sager replied that these records were not kept, according to Boyd.

Boyd testified that he could not find any records of the telephone calls for the period relevant herein. He stated that the computer automatically "purges" itself approximately every 6 months. Crump filed his charges against Ormet and Tracer on November 21, about a month and a half after his discharge on October 5. Sager was still employed by Ormet at that time.

#### 4. The training of the guards

Jarvis Stephens was assigned by Tracer to guard duty at Ormet. According to Stephens, he was put in charge of training new guards. The complaint alleges that Stephens was a "site supervisor" for Tracer.<sup>13</sup> Ormet's answer denies this.<sup>14</sup> However, Tracer's answer admits it.<sup>15</sup>

On cross-examination, Stephens described himself as a "senior sergeant" at Ormet. Asked whether he was a supervisor, he replied: "Administrative duties at that site as supervisor." He "wrote up" a guard for an infraction, maintained timesheets of the guards' hours, and inspected guard posts. He also discussed the guards' switchboard duties. Crump described his switchboard duties as follows:

[T]here was six lines coming into that phone, and sometimes all six would ring at once. I tried following the rule most of the time, and what happened is I would try to find the supervisor and he couldn't be found anywhere in the plant. I would page him over the intercom, and he wouldn't return my call. So then I would tell an employee's wife that she couldn't speak to her husband, and then the employees' wives would become quite irate.

Stephens testified on cross-examination that he told the guards to transfer the telephone calls without supervisory per-

mission if they were too busy. Stephens further testified that he himself put through two or three calls a week without supervisory permission. He was never disciplined for this.

Tracer Operations Manager Donald Coleman denied that Stephens was a supervisor despite his Company's admission to the contrary. Tracer supplied a training manual for the guards. Stephens signed letters stating that the guards had read the training manual. Coleman denied that Stephens was responsible for training the guards. However, he agreed that Stephens probably talked about the material in the manual with the guards. "He was just going over the book with them."

Coleman identified a postinspection report by Stephens at a time when Crump was the guard on duty. Crump was given a rating of "5," or "Outstanding" in three categories, and a "4" in uniform.<sup>16</sup>

#### 5. Crump's discharge

Ormet contends that Richard Sager was the "Ormet official who made the decision to remove Crump from the site."<sup>17</sup> The complaint alleges that Dick Sager was a "supervisor, Respondent Tracer."<sup>18</sup> Tracer's Answer admits this allegation,<sup>19</sup> while Ormet's Answer states that it is without knowledge and therefore denies the allegation.<sup>20</sup> Sager, however, asserted that he had previously been employed by Ormet, and that his title was "safety supervisor." On cross-examination, he testified that he had been discharged "by Ormet."

Sager testified that two Ormet supervisors—Tony Martinez and Clay Smith—reported to him that there had been several incoming and outgoing calls involving their employees without their permission, and that the guard on duty was Crump. W. Clay Smith testified that he was a "shift supervisor," but that at night and on weekends he was responsible for security and "just about everything in the plant." Smith asserted that his employees were making calls "at will." On one such occasion, he discussed the matter with Crump, who denied putting the call through. On a second occasion, an employee told Smith that Crump had given him an outside line. Smith told Crump that he would not put up with it. Crump replied that he was "security," and had the right to use his discretion. Smith reported these conversations to Sager.

Sager testified that he spoke to Crump about the matter and that the latter said that he used his discretion and put through some nonemergency calls because it would eliminate some problems.

Crump testified that he was trained by Stephens. As indicated, sometimes Crump had to handle six calls simultaneously, and could not reach a supervisor to determine whether to put a call through. He asked Stephens about this, and the latter told him to put it through in those circumstances. Stephens did not say there would be any discipline for doing so. Accordingly, Crump testified, he put several calls through.

Crump was asked whether he had been given the reason for his discharge. He replied that, after that event, he was told by Tracer supervisor Donald Coleman that he had transferred a

<sup>10</sup> R. Exh. 1.

<sup>11</sup> G.C. Exh. 2, pars. 12, 18.

<sup>12</sup> Boyd was employed in May 1995, subsequent to the events being litigated.

<sup>13</sup> G.C. Exh. 1(e), par. 6(a).

<sup>14</sup> G.C. Exh. 1(h), par. 6.

<sup>15</sup> G.C. Exh. 1(i).

<sup>16</sup> The document describes "3" as "Good," but does not explain an evaluation of "4." The document also contains a total post evaluation of "54," rated as "Good," and 3 points below "Outstanding." G.C. Exh. 9.

<sup>17</sup> R. Br., p. 2.

<sup>18</sup> G.C. Exh. 1(e) par. 6(a).

<sup>19</sup> G.C. Exh. 1(i).

<sup>20</sup> G.C. Exh. 1(h), par. 6.

call to an employee and had given an outside line to an employee without supervisory permission.<sup>21</sup>

Although Ormet denied in its Answer that Sager was a supervisor, he testified that it was he who made the decision to require Crump's removal from the jobsite. Sager also testified that he did not discipline the guards. Asked how he knew that it was Crump who was on duty when these calls were made, Sager replied that the supervisors told him.

Sager denied knowledge that Crump had informed the Union about the conversations Crump overheard involving Ormet management. Sager denied discussing Crump's discharge, before it was made, with any other Ormet officials, including general manager Quentin Bell or maintenance manager Guy Arnone. He did not believe that he had discussed the matter with Superintendent of Labor Relations Bob Lamb. He denied that John Schexnayder or Danny Rodrigue ever told him that Crump had overheard a conversation involving company officials discussing the discharges of Union officials.

Donald Coleman testified that he received a call from Sager stating that a security officer had violated a written directive. There was a meeting on October 4 involving Coleman, Tracer President David Burton, Tracer Supervisor Louis Simoneaux, and Sager. Coleman testified that Sager told him that Crump had violated Ormet's telephone policy, although he did not state how many times or the specific way in which Ormet determined this. Sager requested that Tracer remove Crump from the site.

Coleman also agreed that he made the following statement in a pretrial affidavit:

David G. Burton, who is Tracer . . . and I made a joint decision to discharge Shane Crump. Burton and I attended a meeting at Ormet on October 4, 1994, with Dick Sager and Louis Simoneaux. The purpose of the meeting was that Sager had received complaints that Crump had allowed employees to receive personal phone calls at work and placed outside calls without the authorization from a supervisor. We were not given the specifics; we were only told that the conduct violated Ormet's written policy. It was a mutual decision that Crump had violated one of Ormet's policies, and it was the best interests of the client for us to remove Crump from his position and terminate him.

Asked whose "mutual decision" it was to take this action concerning Crump, Coleman replied that it was his and Burton's on their way back to their office. He specified that he and Burton then decided to terminate Crump. Coleman had not spoken with Crump at the time this decision was made. The next day, Coleman asserted, he asked Crump whether he had violated the policy, and Crump admitted that he had done so. Coleman then discharged him.

Coleman testified that he had no knowledge of the new telephone policy until Sager called and informed him of it. He did not see the memo about the new policy until the meeting on October 4. Coleman's practice on instructions to guards was to leave a written copy at the guard shack, require a signature

from each guard, and take back copies of the document.<sup>22</sup> Crump never signed any such memo pertaining to the new telephone policy.

Coleman testified that he received additional complaints about Crump. None of these was reduced to writing until after Crump filed his unfair labor practice charges, and none was presented by Sager at the October 4 meeting as a reason for removing Crump.

The first additional incident is that Crump had removed some safety equipment from the storeroom without authorization. There was no allegation of theft. Coleman's action was to inform Crump that he needed authorization to get materials out of the storeroom. Crump also assertedly had pornographic materials and an unauthorized female in the guard shack. Crump and Stonecipher testified that pornographic materials were present throughout the plant, while Crump said that the female was his wife. Coleman's response was to draft a memo to the guards prohibiting pornographic materials in the guard shack, and to inform Crump that unauthorized persons were not allowed in the guard shack.

Crump was alleged to have failed to turn off the power at the gate when leaving it unattended. Coleman told Crump that he had to turn off the power in these circumstances, and Crump said he would do so.

Coleman made an anecdotal report of these alleged infractions after Crump filed his unfair labor practices charges.

Coleman testified that a guard would receive a verbal warning for violation of a client's written directive. Crump did not receive any such warning.

Finally, Jarvis Stephens testified that Sager said Crump was fired because of his "big mouth." Sager agreed that he said this. He meant that Crump seemed to know the answer to any question.

## 6. Evidence of disparate treatment

As indicated above, Jarvis Stephens put through several calls each week without supervisory permission, yet was not disciplined. Gary Stonecipher testified that he put through calls without supervisory authority, and was not disciplined.

Ormet complained to Coleman that Tracer guard Jonathan Wilkinson had been asleep on duty.<sup>23</sup> Tracer's rules provide for various forms of discipline for different offenses, verbal warning, written warning, or termination. Sleeping on duty is punishable by termination.<sup>24</sup> Coleman gave Wilkinson a written warning.<sup>25</sup> Coleman stated that Wilkinson had been up for 24 hours with a sick father, and that Coleman took these circumstances into account in fixing the discipline.

## B. Factual and Legal Conclusions

### 1. The protected activity

General Manager Bell provided partial corroboration for Crump's testimony about a conversation among supervisors. Although there are variations in Bell's testimony as to the individuals present, the precise date, and a different time of day, Bell admitted that he had a conversation with Maintenance Manager Arnone in September, and that he saw Crump. Ormet failed to call Arnone to rebut the statement attributed to him by Crump. This failure warrants an inference that, if called, Ar-

<sup>21</sup> On cross-examination, Crump agreed that he placed a call to an "800" number on a Sunday, that a woman replied with sexual overtones, and that he put this call through to a fellow employee as a joke. He did this on several occasions the same day. There is no evidence that these specific calls were given to Crump as a reason for his discharge, or the date they occurred.

<sup>22</sup> G.C. Exhs. 11, 12, 13.

<sup>23</sup> G.C. Exh. 6.

<sup>24</sup> G.C. Exh. 4, rule 8.

<sup>25</sup> G.C. Exh. 6.

none's testimony would have been adverse to Ormet's case. *Ready Mixed Concrete Co.*, 317 NLRB 1140 (1995). Based on this inference, Bell's partial corroboration of Crump, and the fact that Crump was a more credible witness than Bell, I find that Crump in fact did overhear a conversation on September 15 involving general manager Bell, and supervisors Arnone and Boyle, that Arnone said that there were three union officials he wanted to get rid of, and that the name of Union President Joey Letulle was mentioned.

Crump testified that he called Letulle immediately, and informed him of what he had overheard. Letulle, a supervisor at the time of his testimony, corroborated Crump. I find that Crump did make this call to Letulle. I credit Crump's testimony, that Letulle requested and Crump provided a written document outlining the overheard conversation.

The Board has held that a communication from one employee to another in an attempt to protect the latter's employment constitutes protected concerted activity. *Jhirmack Enterprises*, 283 NLRB 609 (1987).

Ormet argues that Crump was not engaged in protected concerted activity. The first reason is that he was "eavesdropping" on a management discussion. He went into the guard shack, and then returned outside, in order to hear more of the conversation.<sup>26</sup> Crump, however, testified without contradiction that he customarily smoked outside the guard shack, but returned to answer the telephone. I conclude that Crump was not engaged in eavesdropping, and had a justifiable reason for being out of the guard shack. If the supervisors did not want Crump to overhear their conversation, they could simply have moved away. Crump had to remain where he was because of his job assignment.

The second reason given by Ormet is that Crump, as a security guard, had a duty of loyalty to Ormet which precluded him from reporting the conversation to another employee.<sup>27</sup> There is no precedent for such a position. In effect, it would exclude guards from the protection of Section 7 of the Act.

I conclude that Crump was engaged in protected concerted activity.

## 2. Ormet's knowledge of Crump's protected activity

Ormet's knowledge of Crump's protected concerted activity is based on several facts. In the first place, Bell admitted that he saw Crump when Bell was having the overheard conversation with Arnone and others.

The next issue is whether Letulle told Supervisor Schexnayder at their second session that "a guard" told Letulle that they were going to be fired. Although Letulle denied that he said anything about a call from "Shane Crump," he did not deny saying that, "a guard" had made the report to him—and this was the substance of Stonecipher's testimony. Although Letulle was the Union president at the time of the litigated events, he was a supervisor at the time of the hearing. Although his pretrial affidavit was executed at a time when he was still the union president, it does not directly rebut Stonecipher's testimony.

The only evidence rebutting Stonecipher is that from Schexnayder. Letulle's pretrial affidavit avers that he told Crump before his second session with Schexnayder that he was going to see what Crump's report of discipline was all about. Having received the call from Crump just before his second session

with Schexnayder, it would be normal for him to pursue the matter in what he knew was going to be a disciplinary meeting. Stonecipher was a more credible witness than Schexnayder, and I credit his testimony that Letulle told the supervisor that "a guard" had reported the overheard conversation to Letulle.<sup>28</sup>

The next issue is whether Union official Gonzales in late September informed Bob Lamb, Ormet's director of labor relations, that the Union intended to file charges based on the fact that company officials, including Guy Arnone, were overheard planning to terminate union officials. Gonzales' testimony is uncontradicted. He was a credible witness, and I credit his testimony.<sup>29</sup>

Ormet argues that "the Ormet official who made the decision to remove Crump from the site, Richard Sager, did not even know at the time he made the decision that Crump had overheard the conversation or reported it to the Union."<sup>30</sup> This argument raises the issues of whether Sager was the decision maker, and what he knew about the overheard conversation at the time of Crump's discharge.

Ormet's contention that Sager was the decision maker is clouded by the contradiction in the evidence as to the identity of Sager's employer. Although the pleadings of both respondents seem to establish that he was a supervisor for Tracer, Sager, and, apparently Coleman, aver that he was an Ormet official. A second doubt is raised by Coleman's testimony about the "mutual decision" to terminate Crump. Coleman's testimony that a "mutual decision" to terminate Crump was made by him and Burton on their way back to their office is contrary to the apparent meanings of his pretrial affidavit.

The credited evidence establishes that general manager Bell saw Crump at a time when Bell was discussing the discharge of Union officials with supervisor Arnone. It also establishes that then Union president Letulle told supervisor Schexnayder that a guard had told Letulle that he and other employees were going to be fired. Finally, superintendent of labor relations Lamb was informed by the Union in late September that the Union was going to file charges based on this overheard conversation. It would have been simple for Ormet to put this information together and determine that it was Crump who overheard the conversation.

<sup>28</sup> Ormet attacks Stonecipher's credibility on the ground that he received workmen's compensation benefits after being released by his doctor, and denied that he filed an unfair labor practice charge against the Union. Stonecipher testified that he was injured on the job, was seen by one doctor, released and then seen by a second doctor, who did not release him. Stonecipher maintained that he himself did not fill out the workmen's compensation forms, and assumed that Ormet had done so. He was later discharged for receiving benefits. He called the Board intending to file a charge against Ormet, but an investigator told him it was "too late." She suggested that he could file against the Union for failure to arbitrate his discharge. This would keep the case "on file." She mailed the charge to Stonecipher, and he signed it (R. Exh. 3-C). He denied that the Union had refused to process a grievance. He had simply not heard from them.

I have carefully considered this evidence. Stonecipher was unsophisticated in labor law matters, and I do not consider that this evidence establishes that he was an unreliable witness.

<sup>29</sup> The General Counsel argues that an adverse inference is warranted based on the fact that Ormet did not call Lamb to rebut Gonzales' testimony. This is technically correct, but I base my finding on Gonzales' credible and uncontradicted testimony.

<sup>30</sup> Ormet Br., p. 2.

<sup>26</sup> R. Br. 9-10.

<sup>27</sup> Ibid.



Nonetheless, Respondent argues that Sager, as the “decision maker” had no knowledge of Crump’s activity. Ormet cites *Delchamps, Inc. v. NLRB*, 585 F.2d 91 (5th Cir. 1978), *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408 (5th Cir. 1981), and *Cardinal Hayes Home for Children*, 315 NLRB 583 (1994), in support of its argument. However, in each of these cases, the knowledge of union activity was possessed by a lower ranking supervisor who failed to impart the knowledge to a higher ranking official who made the decision to discharge. By contrast, in the instant proceeding there is evidence that higher ranking officials had the requisite knowledge. Sager’s testimony that none of this information was transmitted to him is unbelievable. That the superintendent of labor relations (Lamb) would not inform “safety supervisor” Sager that the Union intended to file a charge based on the overheard conversation, and that Sager would not have received input based on what general manager Bell and supervisor Schexnayder knew, is simply contrary to the way labor relations are conducted in modern day business. This would be so if Sager, as he insisted, was an Ormet employee. If he was an employee of Tracer, then the only explanation based on Sager’s testimony is that four Tracer officials went off on a lark and decided to fire Crump. This is even more unbelievable than the first hypothesis.

The courts have held that knowledge of union activities may be based on circumstantial evidence. *Texas Aluminum Co. v. NLRB* 435 F.2d 917 (5th Cir. 1970). The circumstances of this case warrant an inference that whoever it was in Ormet’s hierarchy that made the decision to remove Crump had knowledge of his protected activities, and I so find. *Pinkerton’s, Inc.*, 295 NLRB, 538 (1989).

### 3. The alleged unlawfulness of Crump’s discharge

The General Counsel has the burden of establishing a prima facie case that is sufficient to support the inference that protected conduct was a motivating factor in an employer’s decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct.<sup>31</sup>

Ormet’s animus against Crump is established by the fact that several company officials discussed discharging union officials. When it learned that this conversation had been overheard by Crump, and that the Union was planning to file charges based on the conversation, its animus against the Union was extended to Crump. The timing of Crump’s discharge, about 3 weeks after the overheard conversation, provides additional evidence that the protected activity was a factor in Ormet’s decision to discipline Crump. The General Counsel has thus established a prima facie case.

I conclude that the evidence shows that Ormet at the very least caused Tracer to remove Crump from the jobsite. It is unlikely that Tracer would have removed Crump without a request from Ormet. Indeed, Tracer ascribed its action in this matter to Ormet. I conclude that Ormet did so, because of Crump’s protected activity.

The Board has held in these circumstances, where a general contractor caused a subcontractor to transfer an employee because of union activity, that both the general contractor and the subcontractor violated the Act. *Dews Construction Corp.*, 231

NLRB 182 (1977). Accordingly, the prima facie case applies both to Ormet and Tracer.

Ormet’s argument that Crump was discharged because of violation of the new telephone rule, and other conduct, is not meritorious. Crump was an employee of Tracer, and Tracer’s rules stated that a guard had to follow the “chain of command,” and report all concerns to his immediate supervisor. Tracer’s Answer admits that Jarvis Stephens was a supervisor, and the record clearly establishes that he trained guards including Crump. Stephens told Crump that he could use his discretion in placing calls when it became too busy. Crump’s staggering list of duties, including a 6-line switchboard and 75 to 100 phones inside the plant, make it certain that he was frequently busy.

Sager said that he relied on reports from supervisors. The evidence from the only supervisor who testified, Clay Smith, suggests that Crump on or about two occasions put calls through without supervisory permission. No other offense was given by Ormet to Tracer as a ground for removing Crump from the jobsite. Although other objections to Crump were given at the hearing, Tracer did not record them until after Crump filed his unfair labor practice charge. These objections to Crump are afterthoughts. The only official record of Crump’s work, the postinspection by Stephens, suggests that Crump was a good employee.

Neither Ormet nor Tracer has given a credible reason for discharging Crump. Before getting Crump’s position, including his instructions from Stephens, Tracer decided to discharge him in the “interests” of Ormet. This makes no sense at all. Ormet’s “interests,” taken at face value, would have been served by his removal from the jobsite. Tracer could have transferred Crump to another of its jobs. And yet, without any stated reason other than Ormet’s “interests,” and without consulting Crump, it decided to discharge him.

While this was going on, Stephens and Stonecipher were also placing calls to employees without supervisory permission, and without discipline. Ormet’s electronic telephone system made a record of these calls, and Sager read these reports. Yet neither Stephens nor Stonecipher was disciplined for engaging in this conduct. Jonathan Wilkinson, who committed the dischargeable offense of sleeping on duty, was given the lenient discipline of a reprimand, because he had to be up with a sick father. Crump’s reason for putting through 2 calls was not investigated by either Respondent. He was simply discharged. I find that the reasons given for both Ormet’s removal request and the discharge were pretextual.

On the authority of *Dews Construction*, supra, I conclude that Ormet caused Tracer to remove Crump from the jobsite and discharge him because, of his protected, concerted activities. In doing so, Ormet and Tracer violated Section 8(a)(1) of the Act.

In accordance with my findings above, I make the following

### CONCLUSIONS OF LAW

1. Tracer Protection Services Inc. and Ormet Primary Aluminum Corporation are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO Local Union 14465, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. On October 5, 1994, Ormet requested and caused Tracer to remove Shane Crump, a Tracer employee, from his position as a guard at Ormet’s manufacturing facility, and caused Tracer

<sup>31</sup> *Wright Line*, 251 NLRB 1083 (1980), enf’d 662 F.2d 889 (1st Cir. 1981), cert. denied 455 US 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 484 U.S. 393 (1983).

to discharge him because Crump engaged in concerted, protected activity, thus violating Section 8(a)(1) of the Act.

4. The foregoing unfair labor practice affects commerce within the meaning of Section 2(2) and (6) and (7) of the Act.

#### THE REMEDY

It having been found that both Respondents have engaged in certain unfair labor practices, it is recommended that they be required to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondents unlawfully removed Shane Crump from his security job at Ormet's facility on October 5, 1994, and discharged him, it is recommended that Respondents jointly and severally be ordered to offer Crump reinstatement to his former position without prejudice to his seniority or other rights and privileges previously enjoyed, or, if any such position does not exist, to a substantially equivalent position, and to make him whole for any loss of earnings he may have suffered by reason of Respondents' unlawful conduct by

paying him a sum of money equal to the amount he would have earned from the time of his unlawful removal and discharge to the date of an offer of reinstatement, less net earnings during such period, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>32</sup> I further recommend that both Respondents be ordered to expunge from their records all references to their unlawful discipline of Shane Crump, and to inform him in writing that this has been done, and that such records will not be used against him in any way. I shall also recommend the posting of notices signed by both Respondents.

[Recommended Order omitted from publication.]

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<sup>32</sup> Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1988 amendment to 26 U.S.C. Sec. 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).